

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

50965

FILE: B-184313

DATE: July 30, 1975

MATTER OF: Kleen-Rite Corporation

97328

DIGEST:

1. Protest alleging that low bids under total small business set-aside procurements were nonresponsive because they were submitted by other than a small business concern is dismissed as premature, because Small Business Administration has not yet exercised its conclusive authority to determine the size status of the low bidder.
2. GAO does not review protests against affirmative determinations of responsibility unless either fraud is alleged on the part of procuring officials or where the solicitation contains definitive responsibility criteria which allegedly have not been applied.


Counsel for Kleen-Rite Corporation protested before award the responsibility of the low bidder, T&S Service Associates, Inc. (T&S), and the responsiveness of its bids submitted under IFB Nos. DAEA08-75-B-0014 and -0015, issued by Fort Ritchie, Maryland. Kleen-Rite alleges that the IFBs' small business set-aside provisions require that bids submitted by other than small business concerns be rejected as nonresponsive. Kleen-Rite protested against the small business size status of T&S to the contracting officer and to the Small Business Administration (SBA), whose Boston Regional Office determined T&S to be a small business concern for the purposes of these procurements. Kleen-Rite has appealed that determination to the SBA Size Appeals Board. Kleen-Rite requests that this Office find both T&S bids nonresponsive if the SBA determines that T&S is not a small business concern. With regard to T&S's responsibility, Kleen-Rite alleges that T&S cannot perform in a satisfactory manner at its bid price on either IFB, if it is to meet the required minimum wages in each invitation. Kleen-Rite therefore concludes that T&S should not be considered for award on either procurement.

Under 15 U.S.C. § 637(b)(6)(1970), it is the duty of SBA, rather than our Office, to determine whether a concern is a small business for purposes of a particular procurement, and SBA's determination is conclusive upon the procurement agency involved. See National Electrical Contractors Association, B-181511, July 15, 1974. Accordingly, SBA will determine the size status of T&S and the procuring

agency will be bound by that determination. In the event that the procuring agency finds T&S's bids responsive to the IFBs in question after the SBA has determined that T&S is not small business, this protest may be reinstated.

With regard to the allegation that Kleen-Rite cannot perform in a satisfactory manner, this Office does not review protests against affirmative determinations of responsibility, unless either fraud is alleged on the part of procuring officials or where the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Central Metal Products, Inc., 54 Comp. Gen. 66 (1974). Affirmative determinations are based in large measure on subjective judgments which are largely within the discretion of procuring officials who must suffer any difficulties experienced by reason of a contractor's inability to perform. However, we will continue to consider protests against determinations of nonresponsibility to provide assurance against the arbitrary rejection of bids.

Kleen-Rite's protest is dismissed as premature insofar as it concerns the responsiveness of T&S's bids, and is denied as to that portion concerning T&S's responsibility.


Deputy Comptroller General'
of the United States